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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROY ROMER, as Governor of the State of Colorado and the STATE OF COLORADO,
Petitioners,

v.

RICHARD G. EVANS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Stripped of rhetoric, Respondents' arguments present two themes: (1) the Court should overrule *James* v. *Valtierra* and extend beyond race the narrow *Hunter* exception to rational basis review of internal state government restructurings; and (2) Amendment 2 fails rational basis review—that is, Amendment 2 "is so unrelated to the achievement of *any combination* of legitimate purposes that [the Court] can *only* conclude that the [Colorado voters'] actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979) (emphasis added).

Respondents' arguments fail because they are premised not upon law, but rather upon a parade of horribles derived from imagined interpretations and applications of Amendment 2. In following this approach, Respondents have simply ignored the *facial* nature of their challenge—Amendment 2 has *never* been applied, much less in the extreme manner hypothesized by Respondents. Amendment 2 is facially valid so long as at least *some* of its applications would be constitutional, *see, e.g., United States* v. *Salerno*, 481 U.S. 739, 744-45 (1987); Respondents' concern that Amendment 2 *might* be misused can be addressed only in the context of an "as applied" challenge by an affected individual.

All that is at issue here is whether Coloradans can divest their elected representatives of authority to deal with a particular *issue*—protections for homosexuals and bisexuals that go beyond those afforded by federal law—and instead insist that this question of public policy be resolved solely by the people on a statewide basis. Under the established jurisprudence of this Court, which stands on bedrock principles of federalism, such ordering of a State's internal affairs is subject to heightened scrutiny in a federal equal protection challenge *only* if it classifies on the basis of race or infringes a fundamental constitutional right. Amendment 2, which furthers numerous legitimate—even compelling—state purposes, infringes no

fundamental right, and Respondents unequivocally disavow any reliance here on suspect class.[1] Under settled law the judgment below must be reversed.

I. THE *HUNTER* EXCEPTION IS LIMITED TO RACIAL CLASSIFICATIONS.

Far from effectuating a sweeping reworking of the American political process, *Hunter* v. *Erickson*, 393 U.S. 385 (1969), established a narrow exception to the traditional rules of judicial restraint that apply to federal equal protection challenges to a State's structuring of its own government. The *only* area where this Court has condoned close scrutiny of such state decisions is in the context of race. But the exceptional judicial review engendered by racial classifications cannot lead to the conclusion that every restructuring of state government, regardless of the group affected, is inherently suspect. To the contrary, recognizing the "unique nature of state decisions that 'go to the heart of representative government,'" *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991), this Court has steadfastly applied the opposite presumption.[2]

A. Respondents simply ignore the overriding importance of race in *Hunter*,[3] *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982) and *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).[4] More fundamentally, Respondents do nothing to explain why *James* v. *Valtierra*, 402 U.S. 137 (1971), does not control this case. In *James*, this Court expressly rejected Respondents' argument that the *Hunter* exception should be extended beyond race. *See* 402 U.S. at 139. Contrary to Respondents' position, it is no answer to declare that the privilege of strict scrutiny is "limited" to those groups that are "independently identifiable."[5] Certainly, the poor are as readily identifiable a group as homosexuals and bisexuals. *See James*, 402 U.S. at 139; *id.* at 144-45 (Marshall, J., dissenting) ("[i]t is rather an explicit classification on the basis of poverty").

Respondents attempt to glean support for the doctrinal expansion they seek by noting that this Court also engages in close scrutiny of state laws that disenfranchise, dilute votes, limit ballot access, or gerrymander, even when no racial lines are drawn. In each of those areas, however, the Court's exacting examination expressly rested on the State's infringement of one or both of the established

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[1] The trial court considered and rejected Respondents' suspect class claim, Pet. App. C-14 to C-19, and certified its *judgment* (encompassing all subsidiary rulings) for appeal under Colo. R. Civ. P. 54(b). J.A. 267-68; Pet. Opp. 4, 14-15. Respondents did not appeal, and thus the suspect class issue is not merely absent here; it can never be a part of this case.

[2] Respondents attack a straw man in arguing that state allocations of governmental power are not *exempt* from the Fourteenth Amendment. *See* Resp. Br. 24-25. Petitioners argue—as this Court has consistently held—that the *level* of "scrutiny 'will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives.'" *Gregory*, 501 U.S. at 469.

[3] Justice Harlan's concurrence, like the *Hunter* majority, focused on the racial nature of the classification at issue and never suggested that strict scrutiny be extended to non-suspect classes. *See* 393 U.S. at 394-95. And the only portion of Justice Harlan's analysis adopted by the Court in *Washington* was his conclusion, with which petitioners have no quarrel, that "the voters of the polity may express their displeasure through an established legislative or referendum procedure when particular legislation 'arouses passionate opposition.'" *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 473, 483 (1982) (*quoting Hunter*, 393 U.S. at 395 (concurring opinion)). In any event, Justice Harlan voted with the *majority* in *James* v. *Valtierra*.

[4] *See* Pet. Br. 21-23 & n.12; *Gomillion*, 364 U.S. at 341 ("the legislation is solely concerned with segregating white and colored voters"). *See also James* v. *Valtierra*, 402 U.S. 137, 141 (1971) (expressly distinguishing *Gomillion* as a race case).

[5] Respondents get no support from *Gordon* v. *Lance*, 403 U.S. 1 (1971). The popular referendum in *Gordon*—which like that in *James* did not involve race—required super-majoritarian approval of increases in bond indebtedness or state tax rates. In *upholding* that requirement, the Court held that it "single[d] out no discrete and insular minority for special treatment." *Gordon*, 403 U.S. at 5. Thus, the *holding* in *Gordon* clearly supports Petitioners' position.

fundamental rights of voting and political association.[6] Neither fundamental right is implicated here—no citizen has been disenfranchised, prevented from casting an equally weighted vote, or in any way hindered in electing the representative of his or her choice by Amendment 2. Indeed, it is difficult to comprehend how allowing every voter a direct voice on an *issue*, rather than filtering the issue through representatives, denies political participation rights. As the Court has explained:

> The equal protection principles applicable in gauging the fairness of an election involving the choice of legislative representatives are of limited relevance, however, in analyzing the propriety of recognizing distinctive voter interests in a "single-shot" referendum. In a referendum, the expression of voter will is direct, and there is no need to assure that the voters' views will be adequately represented through their representatives in the legislature. The policy impact of a referendum is also different in kind from the impact of choosing representatives—instead of sending legislators off to the state capitol to vote on a multitude of issues, the referendum puts one discrete issue to the voters.

Town of Lockport v. *Citizens for Community Action at Local Levels, Inc.*, 430 U.S. 259, 266 (1977). Respondents lost a political battle, but they are free to fight it again without any restriction on their voting rights.[7]

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[6] *See, e.g., Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Reynolds* v. *Sims*, 377 U.S. 533, 561 (1964); *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Davis* v. *Bandemer*, 478 U.S. 109, 118 (1986).

[7] Respondents remain free to seek local and state legislation on anything other than quota preferences and the other special protections addressed by Amendment 2. Further, because the votes of Respondents and their supporters continue to count as much as anyone else's vote, elected representatives obviously will not suddenly ignore all of the concerns of thousands of voters. And even on the single issue addressed by Amendment 2, those favoring legislative control of anti-discrimination issues retain an avenue to have their views adopted—Amendment 2 may be modified or repealed by a simple majority vote of the electorate. Respondents suggest that popular amendment of state constitutions is extraordinary, but in truth it is commonplace and an integral part of the normal political process—from 1986 through 1993, for example, 1007 state constitutional amendments were proposed, of which 708 (70.3%) were adopted. *See* Council of State Governments, *The Book of the States* 2 (1994). Colorado has amended its constitution 124 times since statehood. *Id.* at 19.

B. In the absence of any existing, relevant fundamental right, Respondents would have the Court create a *new* fundamental right of certain groups to demand that the people place no limits on the policies that their elected representatives can legislate. Given the strong presumption against the creation of new rights,[8] the oddity of a fundamental constitutional right that accrues not to all individuals, but only to favored groups,[9] and the inherent implausibility of the idea that the Framers of the Constitution intended to abolish the people's right to delimit the authority of their representatives,[10] it is not surprising that Respondents' approach finds no support in any of this Court's prior decisions.[11]

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[8] *See San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws").

[9] *See Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2112 (1995) ("the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*").

[10] *See City of Eastlake* v. *Forest City Enters.*, 426 U.S. 668, 672 (1976) ("In establishing legislative bodies, the people can reserve to themselves the power to deal directly with matters which might otherwise be assigned to the legislature"); Colo. Const. art. V, § 1(2) ("[t]he first power hereby reserved by the people is the initiative").

[11] Respondents and their *amici* cannot disguise the radical departure from established equal protection jurisprudence they propose by citing "neutral principles." Neutrality is of constitutional significance only in determining the existence or nonexistence of "invidious"—*i.e.*, suspect class—discrimination by a challenged law. Any broader conception of neutrality would be flatly inconsistent with *James*, which upheld as rational a popular referendum with the clear purpose of making it more difficult for the poor to obtain favorable legislation. If there is no suspect class or fundamental

Respondents seek comfort in the Court's references to "an inalienable right to full and effective participation in the political processes," *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964), only by ignoring that the "political processes" to which the Court was referring were the "processes by which candidates are nominated and elected." *Davis* v. *Bandemer*, 478 U.S. 109, 137 (1986).[12] Outside the context of race, this Court gives close scrutiny only to those internal state structures that infringe the right to *select* elected representatives, and *not* to those that merely affect the powers of those representatives once elected.[13] In sum, Amendment 2 infringes no fundamental right, and Respondents' position thus stands or falls on the propriety of overruling *James* and extending *Hunter* beyond the unique context of race.

II. NOTHING WARRANTS OVERRULING *JAMES* AND BROADENING THE *HUNTER* EXCEPTION.

Respondents offer two reasons for ignoring *James*: (1) their claim—supported by a parade of horribles—that unless the Court facially invalidates Amendment 2, homosexuals and bisexuals will be deprived of all legal redress for every conceivable wrong; and (2) arguments that the Court can sidestep *James* without revolutionizing its equal protection jurisprudence and fundamentally redefining federal-state relations. Neither contention has merit.

A. Respondents speculate that Amendment 2 could deprive homosexuals and bisexuals of legal redress for any possible wrong done to them by government or private

right involved, and the State's classification is rational, a lack of "neutrality" is utterly beside the point. *See, e.g., Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications").

[12] *See also Board of Estimate of New York* v. *Morris*, 489 U.S. 688, 692 (1989); *Reynolds*, 377 U.S. at 565.

[13] *See Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969) ("Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not"); *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969).

citizens. *See* Resp. Br. 34-35; Br. for *Amicus Curiae* Nat'l Bar Ass'n 3. The State's consistent position and the record below dispel any notion that Amendment 2 was intended to, or by its terms would accomplish, such a result. More fundamentally, even if putative concerns about police protection, public benefits, library services, and judicial indifference did not overlook the existence of the Fourteenth Amendment and the Supremacy Clause, *see, e.g., Howlett* v. *Rose*, 496 U.S. 356, 369-71 (1990) (state courts cannot refuse to entertain a federally mandated cause of action),[14] these extreme applications of Amendment 2 are wholly irrelevant to this *facial* challenge.

Outside the limited context of the First Amendment (with its unique overbreadth component), a party seeking facial invalidation of a statute cannot rely upon extreme hypotheticals that may never occur but instead "must establish that *no* set of circumstances exists under which the Act would be constitutional." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Speculation that Amendment 2 *might* operate unconstitutionally in some conceivable circumstances therefore does nothing to advance Respondents' case for facial invalidation. *See, e.g., Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) ("The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur"). Rather, those concerns can be addressed only in future "as applied" challenges, if and when the applications Respondents fear ever occur.[15]

[14] The repeal of special protections for homosexuals and bisexuals plainly will not deprive anyone of basic police services. The duty of the police to protect citizens arises out of their public office and not from anti-discrimination laws which have never been extended to all citizens. Any concern that Amendment 2 might actually be construed to sanction police discrimination ignores both the State's consistent construction and the Fourteenth Amendment, which protects all persons, regardless of group affiliation, from arbitrary, irrational government actions.

[15] *See, e.g., INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991); *Rust* v. *Sullivan*, 500 U.S. 173, 182

So long as there is any possible construction of Amendment 2 that is constitutionally permissible, it is facially valid. *See, e.g., Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975). Here, such a construction is not only possible, but is entitled to great deference because it is that of the Colorado Attorney General.[16]

Read as a whole in light of the circumstances under which it was enacted, Amendment 2 does not, as Respondents contend, eliminate all legal rights for homosexuals and bisexuals or protect those who break the law by harming or threatening homosexuals and bisexuals; rather, it merely invalidates existing, and prohibits future, local and state laws providing special protections beyond those required by the Fourteenth Amendment. The State consistently has interpreted Amendment 2 in a manner that authoritatively dispels Respondents' extreme rhetoric and confirms Amendment 2's facial constitutionality. Amendment 2 simply restores and maintains the *status quo ante* regarding special protections for homosexuals and bisexuals, thereby preserving this area of private autonomy. By its terms, Amendment 2: (1) prohibits state and local governments; (2) from enacting or enforcing any law or policy; (3) recognizing a claim of minority status, quota preferences, protected status, or discrimination, beyond those guaranteed by federal law; (4) premised on homosexual or bisexual orientation, conduct, practices, or relationships.

Respondents focus on the word "discrimination," which, of course, must be read in context with the "minority status," "quota preferences," and "protected status" terms which immediately precede it (and appear in the title of the amendment). These terms are all commonly used in

(1991); Laurence H. Tribe, *American Constitutional Law* 1022 (2d ed. 1988) ("Of course, almost every law . . . is potentially applicable to constitutionally protected acts; that danger does not invalidate the law as such but merely invalidates its enforcement against protected activity").

[16] *See Kolender* v. *Lawson*, 461 U.S. 352, 355 (1983); *Union Ins. Co.* v. *Hoge*, 62 U.S. (21 How.) 35, 66 (1858).

the civil rights context to refer to situations where special consideration or protection is accorded. Applying traditional principles of statutory construction, the accompanying reference to "discrimination" should be given similar import. *See Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995) (applying principle of *noscitur a sociis*, *i.e.*, "a word is known by the company it keeps"). Indeed, the special protections relating to sexual orientation promulgated by various Colorado entities prior to the passage of Amendment 2 had themselves been phrased in terms of prohibitions on "discrimination" and expressly brought government regulation into a host of private disputes. *See* J.A. 22, 32, 62, 90. It is therefore unsurprising that in seeking to repeal these measures, the proponents of Amendment 2 used the same terminology.[17]

That Amendment 2 would not deny homosexuals and bisexuals all legal rights was made plain to the voters in the widely distributed Legislative Council Analysis of Ballot Proposals ("Ballot Analysis").[18] The Ballot Analysis noted that "[t]he amendment would not affect the anti-discrimination policies based on sexual orientation that have been adopted by numerous private employers," and that homosexuals would remain "entitled to recourse under the tort laws for libelous or slanderous abuse, wrongful discharge, emotional distress, or similar theories." Pet. App. F-6, F-7. Amendment 2 is thus readily construed as facially constitutional: it simply realigns the

[17] Respondents complain that Amendment 2 would invalidate only the homosexual aspect of sexual orientation provisions. *See* Resp. Br. 6, 10 n.11, 42. Of course, it remains to be seen whether legislators will elect to retain sexual orientation provisions that apply only to heterosexual discrimination. Even if they do, however, any equal protection problem would properly be addressed in an "as applied" challenge to the ordinance in question, not in this facial challenge to Amendment 2.

[18] *See* Pet. App. F. The Ballot Analysis is recognized in Colorado as providing important insight into the electorate's understanding of a constitutional amendment. *See, e.g., Carrara Place, Ltd.* v. *Arapahoe County Bd. of Equalization*, 761 P.2d 197, 203-04 (Colo. 1988).

rights of Coloradans with those existing under federal law by nullifying the effect of existing state and local laws or policies, which provided special legal protections to homosexuals or bisexuals, and ensuring that such laws are adopted in the future only by statewide referendum.

This construction is consistent with "the State Court's view of the purpose of its own law." *U.S. Term Limits, Inc.* v. *Thornton*, 115 S. Ct. 1842, 1867 (1995). The Colorado Supreme Court properly recognized that speculative interpretations are improper in a facial challenge, basing its decision instead solely on Amendment 2's "unambiguous[]" prohibition on "the enactment of anti-discrimination laws by state or local entities." Pet. App. D-24 n.25. The court determined that Amendment 2 "repeal[s] existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation," *id.* at D-24 (footnote omitted), and "prohibit[s] any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." *Id.* at D-25. The court expressly *declined* to "determine what broader application Amendment 2 might have," *id.* at D-24 n.25, and no broader construction can be justified in evaluating Respondents' facial challenge.

Respondents' parade of horribles thus provides no justification for overruling *James* (and *Salerno, et al.*)—if an unconstitutional *application* ever occurs, it can be remedied in an "as applied" challenge by the affected individual. Respondents' argument also establishes that Amendment 2, properly construed, is plainly constitutional. Even Respondents concede that Amendment 2's repeal of existing anti-discrimination and preference ordinances could not violate the Fourteenth Amendment. *See* Resp. Br. 6. And, as this Court held in *Crawford* v. *Los Angeles Bd. of Educ.*, 458 U.S. 527, 535-36 (1982), a State is equally free to insist that protections that go beyond the requirements of the Fourteenth Amendment be adopted, if at all, only by statewide referendum.

B. Respondents' claim that *James* can be overruled with little or no impact on federal-state relations is equally flawed. Extending *Hunter*'s narrow exception to any "independently identifiable" group allows the exception to swallow the rule and would place final authority with respect to States' internal structurings firmly in the hands of the federal judiciary. Every law classifies and thus every law affects "independently identifiable" groups, if the person defining the group employs any imagination at all. In *James*, the group directly harmed comprised individuals who supported subsidized housing, and the readily identifiable sub-group was the poor. Here, those immediately affected by Amendment 2 are voters who want anti-discrimination policy set at the local level; an identifiable sub-group is homosexuals and bisexuals. Amendment 2 treats political issues, not individuals differently, and thus reveals that once the search for "independently identifiable" groups is allowed to proceed outside of the unique race-specific context in which it arose, that inquiry becomes meaningless.[19]

Respondents' argument that heightened scrutiny should occur "only" when a law singles out the "independently identifiable" group based upon traits that are unrelated to the issue addressed by the law is also boundless. Virtually every group affected by a legislative classification is defined by characteristics distinct from how members of the group voted. Gun owners, civil servants, incumbent politicians, convicted felons, farmers, insurance companies, hot dog vendors, and members of every other conceivable interest group share common traits which make them "in-

[19] Moreover, witnesses on both sides agreed that there is no consensus or accepted definition of what constitutes homosexuality or bisexuality. *See* R. at v. 13, p. 276; v. 14, pp. 699-700; v. 15, pp. 862, 869-70; v. 17, pp. 1158, 1161-62. If the group definition is inherently a matter of *self*-identification, as Respondents' evidence indicated, then the test collapses upon itself, because it lacks both identifiability and independence. *See Equality Found., Inc.* v. *City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995).

dependently identifiable" quite apart from any legal measure that adversely affects them.[20]

It is not surprising, then, that Respondents have been unwilling to say who—other than homosexuals and bisexuals—can invoke their new fundamental right. In truth, either everyone can invoke strict scrutiny—bringing popular self-government to its knees—or *only* homosexuals and bisexuals qualify—which reveals this proposed doctrine for what it is: a backdoor means to acquire suspect class treatment.

Respondents' *amici* propose an even more radical federal intrusion on the States' internal allocations of authority. Eschewing the whole question of levels of scrutiny, these *amici* make the novel claim that the Equal Protection Clause authorizes the Court simply to *declare* Amendment 2 *per se* unconstitutional *without even examining the State's justifications. See* Br. of *Amici Curiae* Tribe, *et al.*

These *amici* candidly concede that their extraordinary approach is unprecedented—even in the context of race. Further, the entire argument rests on the fallacy that there exists some general state law protection against discrimination of which only homosexuals and bisexuals are deprived by Amendment 2. Of course, just the opposite is true—anti-discrimination laws (as well as quota preferences and minority status) cover *only* members of groups who as a matter of policy have been determined to be deserving of special treatment, an exercise that, by definition, involves line-drawing of precisely the sort reflected in Amendment 2 (and in Title VII of the Civil Rights Act). There certainly is no free-floating fundamental right to have, or to be able to lobby for, state or local quota preferences or protections against discrimination.

[20] Nor are the express references in Amendment 2 to homosexuals and bisexuals of constitutional significance. That language embodies the description of the types of laws and ordinances repealed by Amendment 2. Citing those references, as Respondents do, as evidence of a purposeful *intent* to classify laws granting special protections for homosexuals and bisexuals differently than other anti-discrimination laws adds nothing. Purposeful discrimination is a necessary element of an equal protection claim, *see Washington* v. *Davis*, 426 U.S. 229 (1976), but neither the existence of this classification nor the voters' intent to create the classification is disputed here. Rather, the only issue is the appropriate *level of scrutiny* of the State's justifications for that classification, a question which, in the absence of a suspect class, turns *solely* on the existence or non-existence of a relevant fundamental constitutional right. *See, e.g., Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992).

Amici attempt to conceal this defect by using the term "discrimination" in a purely pejorative sense. But that word, "once divested of its emotional connotation, simply means to distinguish or to draw a line." Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 109 (1976). As Respondents concede here and their *amici* have noted elsewhere, all classifications "discriminate."[21] And in the absence of a suspect class or a fundamental right, such "discrimination" is permissible if there is any rational connection between the classification and legitimate state objectives. The *amici*'s approach would substitute an analysis of "important" issues (in a federal court's view) for fundamental constitutional rights analysis.[22]

In the end, Respondents' *amici*, like Respondents themselves, are left arguing that the Court should create a new fundamental constitutional right to demand that the people place no limits on the policies that

[21] *See* Resp. Br. 37 ("By definition, every classification serves the purpose of discriminating against the group that the classification burdens"); John H. Ely, *Democracy & Distrust* 30 (1980) ("Legislation characteristically classifies, distributing certain benefits to, or requiring certain behavior of, some but not others"); Gerald Gunther, *Constitutional Law* 608 (12th ed. 1991).

[22] *Amici* attempt to avoid the limitless nature of their theory by claiming that Amendment 2 is *sui generis* in rendering a group "completely ineligible" to obtain important legal protections. But Amendment 2 clearly does *not* render supporters of special state law protections for homosexuals and bisexuals "completely ineligible" to obtain them. To the contrary, it merely alters the *means* by which such extraconstitutional protections must be adopted in Colorado—after Amendment 2, a statewide referendum is required.

their elected representatives can legislate. To do so would both revolutionize equal protection jurisprudence and completely rewrite the federal-state balance crafted by the Framers of the Constitution, as the *amici* States note, "effectively prohibit[ing] states from addressing many substantive issues at the state level." *See* Br. of *Amici Curiae* States in Support of Petitioners 3; *id.* at 21-24 (cataloging civil service, education, public utility, abortion funding, anti-smoking and other state measures threatened by Respondents' equal protection theory). Fortunately, that result is foreclosed; under this Court's settled authority—with *James* v. *Valtierra* standing at the forefront—Amendment 2 is subject to rational basis scrutiny.

III. AMENDMENT 2 RATIONALLY SERVES LEGITIMATE STATE ENDS.

Highly deferential rational basis review "requires only a rational means to serve a legitimate end." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985). Respondents do not dispute that Amendment 2 serves each of the State's asserted interests; nor do they argue that all of those interests are illegitimate. Indeed, the lower courts found some of those interests to be not only legitimate, but compelling. *See* Pet. App. B-11, B-13, C-14.[23] Respondents contend that Amendment 2 is facially invalid because (1) it was motivated in part by "antipathy," and (2) its "fit" is not sufficiently "tight" to the interests it serves. Both contentions rest on fundamental misunderstandings of the law and the record.

Respondents are, of course, correct that a naked arbitrary desire affirmatively to harm, by itself, is not a legiti-

[23] *See also Equality Found., Inc.*, 54 F.3d at 270 (finding "a litany of valid community interests" supporting a similar provision, including: (1) "enhanced associational liberty"; (2) "returning the municipal government to a position of neutrality"; (3) reducing "governmental regulation" of "private social and economic conduct" and "augment[ing] the degree of personal autonomy and collective popular sovereignty legally permitted concerning deeply personal choices and beliefs"; and (4) "cost savings for . . . taxpayers").

mate purpose even for non-racial discrimination. But such antipathy was *not* the purpose of Amendment 2. Respondents stumble in their definition of "antipathy." This Court has repeatedly distinguished antipathy for a group from a belief that, when limited public resources must be allocated, one group is less deserving of those resources than another. *See, e.g., United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 (1980). The record demonstrates that Coloradans are largely tolerant of homosexuality,[24] yet unwilling to support governmental action which confers benefits on a relatively privileged group at the expense of the less-privileged.[25]

Respondents attempt to use carefully selected statements of certain supporters of Amendment 2 to infect with a sense of mean-spiritedness those 813,966 Coloradans who cast votes in favor of Amendment 2. But the trial court expressly rejected this condemnation of voter motives, *see* Pet. App. E-10, and that should be the end of the matter. *Crawford*, 458 U.S. at 545 ("we will not dispute the judgment of the [lower court] or impugn the motives of the State's electorate"). In any event, there is simply no basis upon which to conclude that nearly a million Colorado voters were motivated by antipathy.[26] Amend-

[24] In a December 1992 survey: (a) 81% agreed that, except for their choice of sexual partners, homosexuals are not really different from anyone else; (b) 59% thought homosexuals should be allowed to serve in the military; (c) only 6% thought homosexuals were more likely than heterosexuals to molest children; and (d) only 13% thought homosexual behavior should be illegal. *See* Def. Ex. B. (J.A. 120, 123-25; v. 9, p. 65-70).

[25] Seventy-three percent of those surveyed a month after the election thought Amendment 2 was enacted in opposition to laws that give homosexuals a type of special or protected status. *See* Def. Ex. B (J.A. 120; v. 18, p. 1341; v. 19, pp. 1349-51).

[26] *See, e.g., City of Mobile* v. *Bolden*, 446 U.S. 55, 92 (1980) (Stevens, J., concurring) ("a political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decision-making process were motivated by a purpose to disadvantage a minority group"); *Arthur* v. *City of Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986) (inquiries into voter motivation permissible only in the context of race).

ment 2 undeniably was the result of a hard-fought political campaign involving instances of "extremism on both sides," R. at v. 16, p. 897,[27] but the Amendment's sponsors specifically disavowed "hatred" as a motive or effect of the Amendment, relying instead on the basic theme that

> Amendment 2 says basically one thing: that homosexuals, like all Americans, deserve *equal rights*. But nothing about their circumstances, their lifestyle or their political power rates them as a group in need of *special* rights.

Lodging at 7. Significantly, the Ballot Analysis did not include *any* of the fears to which Respondents now point as motivating passage of the amendment. That analysis fully supports the interpretation of Amendment 2 urged by Petitioners. *See* Pet. App. F. *See also Crawford*, 458 U.S. at 543-45 (declining to look beyond the purposes of the proposition as "stated in its text").

Respondents' obsession with the "fit" between Amendment 2 and each of the individual legitimate state interests it serves is equally misplaced. Under rational basis review, a law need not represent a "[]perfect fit between means and ends," *Heller* v. *Doe*, 113 S. Ct. 2637, 2643 (1993), but only a "rough accommodation" of the State's interests. *See, e.g., San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 55 (1973). Respondents merely assume, without analysis, that the purposes of Amendment 2 cannot "explain the law's particular selectivity." Resp. Br. 38. As always, the critical question is whether there *is* a rational reason that justifies disparate treatment. As shown, the Colorado voters' decision to focus on the issue

[27] Respondents make much of the morality-based concerns expressed by certain supporters of Amendment 2. But this Court has repeatedly recognized the validity of legislating on the basis of moral judgment. *See, e.g., Barnes* v. *Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461-62 (1991) (plurality opinion) (State's interest in "protecting order and morality" is "compelling; substantial; subordinating; paramount; cogent; strong"); *id.* at 2465 (Scalia, J., concurring); *id.* at 2469 (Souter, J., concurring). And, in any event, Amendment 2 promotes far more than a simple moral judgment.

of group protections for homsexuals and bisexuals is supported by a number of rational bases, including a concern that an amendment forbidding special preferences on the basis of sexual orientation more generally could have threatened existing marriage, tax, and other laws, thereby seriously undermining legitimate state interests.

An additional flaw in Respondents' analysis is their failure to consider whether Amendment 2 is rationally related to the State's asserted interests considered in the *aggregate*. This Court has repeatedly stated that it "will not overturn . . . a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of *any combination* of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979) (emphasis added). Respondents' interest-by-interest approach incorrectly assumes that what could be constitutionally accomplished by several more narrowly tailored amendments cannot be accomplished in a single amendment that promotes all of the State's asserted interests simultaneously. *See, e.g., Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976) ("That Maryland might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional"). That portion of Amendment 2's "sweep" not fully explained by the State's interest in promoting religious freedom, for example, is easily justified by the State's other legitimate interests, including the State's desire to use its limited resources to provide the benefit of anti-discrimination laws to those most in need.

Even assessed individually, however, each of the State's interests easily satisfies rational basis review. For example, Amendment 2 is a rational response to the undisputed fact that Colorado has finite resources. While this Court has held that a State need not allocate *any* of its resources to provide members of any group with protections from discrimination beyond those afforded by the

Fourteenth Amendment, *see Crawford*, 458 U.S. at 535-40, Colorado has chosen to provide some such benefits. As the trial court found, homosexuals tend to be better educated, wealthier, and possess greater political clout than the public generally, and surely when compared to other protected minorities. *See* Pet. App. B-6 n. 3, C-18. The people of Colorado chose to use the State's limited resources for the benefit of other groups (*e.g.*, racial minorities) who are generally less well situated.[28] This Court has repeatedly affirmed the rationality of this approach.[29] Indeed, that the line drawn by the people of Colorado is both rational and constitutionally legitimate is demonstrated by the fact that Congress in Title VII of the Civil Rights Act made a similar judgment.

Respondents do not even contest that Amendment 2 advances religious freedom or associational privacy; rather, they argue only that these interests "cannot explain either Amendment 2's sweeping ban on protection or its selective concentration of burdens on one group." Resp. Br. 40. But certainly, the State's religious freedom and associational privacy interests explain the repeal of existing special rights and the removal of the issue to the state referendum process. No more is required in this facial challenge.[30] And the people of Colorado could rationally

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[28] Respondents are simply wrong in contending that anti-discrimination protections for homosexuals do not "consume governmental resources." Resp. Br. 41. Every enforcement of such laws utilizes finite court time and resources, placing additional costs on a system already unable speedily to consider the discrimination claims of the relatively less privileged. Respondent cities effectively concede as much: some drew policy lines that exempted small landlords and businesses, while others did not. *Compare* J.A. 33, 42 *with* J.A. 62, 90.

[29] *See, e.g., Jefferson* v. *Hackney*, 406 U.S. 535, 549 (1972); *Dandridge* v. *Williams*, 397 U.S. 471, 479 (1970).

[30] In repeatedly citing *City of Cleburne* v. *Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985), Respondents ignore that *Cleburne* was an "as applied" challenge, and that the Court *vacated* the lower court's facial invalidation of the challenged statute, affirming only

conclude that because laws granting special protections to homosexuals may infringe *both* religious freedom and privacy interests, such laws do greater damage to those interests than other anti-discrimination provisions. *See, e.g., Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 488-89 (1955) (State may address continuum of activity that differs by degrees "one step at a time"). Amendment 2 restores government neutrality on a difficult and divisive social issue; it promotes basic liberty interests by recognizing a diversity of views on this issue.[31]

Finally, Respondents' claim that the State's interest in deterring factionalism—*i.e.*, resolving an issue as a matter of statewide policy—is illegitimate is foreclosed by this Court's repeated recognition that the prevention of factionalism is not only a legitimate, but a *compelling* State interest.[32] Respondents contend that "Amendment 2 suppresses 'factionalism' only by suppresing one side of the political debate." Resp. Br. 47. To the contrary, *neither* side of the debate is suppresed; rather, Amendment 2 requires only that views on this issue—whenever, wherever and by whomever expressed—be *acted upon* by statewide referendum.

* * *

This facial challenge to the constitutionality of Amendment 2 can be correctly decided on the basis of two simple propositions. First, there is no difference between classifications based on poverty and classifications based on homosexuality or bisexuality for purposes of the Equal Protection Clause's fundamental rights analysis, and thus *James* v. *Valtierra* requires this case to be decided under rational basis scrutiny. Second, the same judgment that

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a finding that a particular application was invalid because it rested *solely* "on an irrational prejudice." *Id.* at 447, 450.

[31] Respondents ignore that Amendment 2 repeals laws which expose private individuals to substantial criminal and civil penalties in an extraordinarily broad set of circumstances.

[32] *See, e.g., Storer* v. *Brown*, 415 U.S. 724, 725, 736 (1974); *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989); *Burdick* v. *Takushi*, 504 U.S. 428, 439 (1992).

motivated Congress not to extend the protections of Title VII to homosexuals and bisexuals legitimately motivated Coloradans to repeal those same protections from state agencies and local governments and to insist that the issue be resolved solely, but fairly, by the electorate as a whole.

At the end of the day, Colorado homosexuals and bisexuals, like all individuals, retain Equal Protection Clause protection from irrational *government* classifications (and irrational or unintended *applications* of Amendment 2), but, like most individuals, they have no right to demand government intervention in purely *private* decisions. Through Amendment 2, the people of Colorado overruled the decisions of some of their elected representatives to interject government in such private choices. Amendment 2 accomplishes that goal in a single measure without requiring repetitive repeal efforts, and under this Court's prior decisions Amendment 2 is constitutional.

CONCLUSION

The judgment of the Supreme Court of Colorado should be reversed.

Respectfully submitted,

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